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EXCLUDING WOMEN FROM THE WORKPLACE: EMPLOYMENT DISCRIMINATION VS. PROTECTING FETAL HEALTH

International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, UAW v. Johnson Controls, Inc.[1]

I. INTRODUCTION

American workers, and women in particular, have been the focus of a great deal of protective legislation during the last three decades. In 1964, Congress enacted Title VII of the Civil Rights Act.[2] Among its other provisions, Title VII prohibits employers from excluding women from jobs on the basis of sex.[3] In 1970, Congress passed the Occupational Safety and Health Act (OSHA),[4] which requires that employers protect workers from recognized hazards by making the work environment safe.[5] In 1978, Congress added the Pregnancy Amendment[6] to Title VII, which classified restrictions on employment based upon pregnancy, childbirth, or related medical conditions as sex discrimina-

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1. 886 F.2d 871 (7th Cir. 1989), *cert. granted*, 110 S. Ct. 1522 (1990).
2. 42 U.S.C. §§ 2000e to 2000e-17 (1982).
3. 42 U.S.C. § 2000e-2(a) (1982) provides:
   It shall be an unlawful employment practice for an employer-(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
   (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

Id.

4. 29 U.S.C. §§ 651-678 (1982).
5. OSHA's General Duty Clause requires the employer to provide to "each of his employees a place of employment which is free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees." *Id.* § 654(a)(1).
6. 42 U.S.C. § 2000e(k) (1982).

tion.[7] One of the reasons for this vast amount of legislation is the rate at which women have been entering the job market. "Today women represent 45 percent of all working Americans"[8] and by the year 2000 it is estimated "women will comprise 47 percent of our work force."[9] This means that by the year 2000, eighty-one percent of American women will be working outside the home.[10]

With this increase in the number of women workers has come an increasing awareness of, and concern about, reproductive hazards[11] which accompany exposure to many chemicals[12] found in the workplace. In response to the effects of these hazardous chemicals on the reproductive capabilities of employees, many companies have instituted policies which exclude women from any jobs that appear hazardous to

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7. The Pregnancy Discrimination Act reads as follows:

> (k) The terms "because of sex" or "on the basis of sex" include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment related purposes, including receipt of benefits under fringe benefits programs, as other persons not so affected but similar in their ability or inability to work.

Id.

8. United States Department of Labor, WEEKLY NEWSPAPER SERVICE, Nov. 20, 1989, at 1.

9. *Id.*

10. Department of Labor Report, 54 Fed. Reg. 37,035 (1989).

11. Finneran, *Title VII and Restrictions on Employment of Fertile Women*, 31 LAB. L.J. 223 (1980); Howard, *Hazardous Substances in the Workplace: Implications for the Employment Rights of Women*, 129 U. PA. L. REV. 798 (1981); Williams, *Firing the Woman to Protect the Fetus: The Reconciliation of Fetal Protection with Employment Opportunity Goals under Title VII*, 69 GEO. L.J. 641 (1981).

12. These chemicals can be classified according to their effect on human reproductive processes. Mutagens can alter the genetic structure of reproductive cells in both males and females; such alterations can result in birth defects that may be passed on to future generations. Gametotoxins can limit the fertility of either sex by reducing or damaging the sperm and ova. Teratogens damage the fetus directly by passing through the mother's placenta; damage may occur before the mother is even aware that she is pregnant. Certain substances may have mutagenic, gametotoxic, and teratogenic characteristics. Only if a toxin can be classified exclusively as a teratogen will the threat of reproductive harm be limited to women. Note, *Employment Discrimination—Wright v. Olin Corp.: Title VII and the Exclusion of Women from the Fetally Toxic Workplace*, 62 N.C.L. REV. 1068, 1068 n.3 (1984) (citing Howard, *Hazardous Substances in the Workplace: Implications for the Employment Rights of Women*, 129 U. PA. L. REV. 798, 802-06 (1981)).

the fetus.[13] Male employees are also at risk for future reproductive dysfunctions, such as sperm malformation and a risk of producing a malformed child when exposed to hazardous chemicals.[14] Employers do not, however, typically apply these same policies to exclude men from such jobs.[15]

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13. *See* Note, *Title VII—Employment Discrimination and Fetal Safety in Hazardous Work Environments—Wright, et al. v. Olin Corp.*, 1984 ARIZ. ST. L.J. 211, 212 n.8 in which the author lists employers and substances that have been the subject of exclusionary employment policies:

> American Cyanamid excluded women of childbearing age from jobs involving exposure to the following substances the company considered harmful to fetuses: lead and mercury and their compounds, benzene, vinyl chloride, acrylamide, carbon disulfide, carbon monoxide, carbon tetrachloride, dimethyl sulfate, and cyanide, and excluded women of childbearing age from jobs involving exposure to the substances. Olin Corporation excluded women from its ammunition plants, where benzene was used as a solvent. Benzene is one of the top twelve chemicals by volume used by U.S. industry. It is produced in the petroleum refining and petrochemical industries and used in the manufacture of tires, nylons, pesticides, adhesives, laminates, coatings, inks, paints, varnishes, moldings, and as an octane booster in gasoline.

Id.

B.F. Goodrich excluded women from vinyl chloride exposure (a chemical essential to the production of plastics). *Id.* Other companies with such exclusionary policies include: General Motors, Allied Chemical, Eastman Kodak; Firestone Tire & Rubber, and Goodyear. *Id.* (citing Williams, *Firing the Woman to Protect the Fetus: The Reconciliation of Fetal Protection with Employment Opportunity Goals Under Title VII*, 69 GEO. L.J. 641, 641-48 (1981)).

14. A federal regulation states:

> In male workers exposed to lead there can be . . . decreased ability to produce healthy sperm and sterility . . . . Malformed sperm (teratospermia), decreased number of sperm (hypospermia), and sperm with decreased motility (asthenospermia) can all occur.
>
> . . . .
>
> Germ cells can be affected by lead and cause genetic damage in the egg or sperm cells before conception and result in failure to implant, miscarriage, stillbirth, or birth defects.

29 C.F.R. § 1910.1025, App. C(II)(5) (1989); *see* Howard, *supra* note 11, at 803-05. "Abnormal numbers of chromosomal aberrations in males who work with vinyl chloride lead medical experts to conclude that occupational exposure causes germ cell damage in the father." *Id.* at 804.

15. *See, e.g.*, Howard, *supra* note 11, at 803-06; Williams, *supra* note 11, at 657 & nn.102-03; *see also* Interpretive Guidelines on Employment Discrimination and Reproductive Hazards, 45 Fed. Reg. 7514, 7515 (1980) (proposed Feb. 1, 1980), *withdrawn*, 46 Fed. Reg. 3916 (1981) (arguing that employers do not display the same concern for the reproductive hazards men may encounter)

Employers argue that the prospect of the employer's causing fetal harm is a legitimate basis for excluding women from certain jobs.[16] This argument rests both on the employer's fear of potential tort liability to the harmed infant and on moral grounds.[17]

All workers, both men and women, potentially are exposed to hundreds, if not thousands, of different toxic chemicals each year.[18] In *International Union, United Automobile, Aerospace and Agricultural Implement Workers of America v. Johnson Controls, Inc.*,[19] the Seventh Circuit Court of Appeals upheld Johnson Controls' fetal protection policy which excluded all women with childbearing capability from the workplace because of the toxicity of lead. This case represents one business' response to the potential health risks to workers. If other employers decide to follow Johnson Controls' precedent and establish programs barring women from jobs which may endanger the fetus, the consequences could seriously threaten women's equal opportunity rights.[20]

This Note first discusses the facts of *Johnson Controls* and the legal background relating to the conflict between the employer's rights and duties and a woman's right to be free of discrimination. It then analyzes the Seventh Circuit's decision in light of Title VII[21] and the Pregnancy Amendment[22] mandates and decisions made previously by other circuits. Finally, it discusses the possible impact that the decision may have upon women's work decisions in the future.

[hereinafter Interpretive Guidelines].

16. Becker, *From Muller v. Oregon to Fetal Vulnerability Policies*, 53 U. CHI. L. REV. 1219 (1986).

17. *Id.* Employers stress that they have no way to protect themselves from tort liability, because a woman cannot waive the rights of her unborn children. However, if the employer fully informs the woman of the danger and she continues to work in that area, the employer has not acted in a negligent manner and therefore there does not appear to be a basis for tort liability. *Id.* at 1244.

18. Many different agencies have compiled lists of substances which they consider to be hazardous. *See, e.g.*, Department of Transportation, 49 C.F.R. § 172.101 (1989) (listing over 2,000 substances); Environmental Protection Agency, 40 C.F.R. § 261.30-.33 (1989); Occupational Safety and Health Administration (OSHA), 29 C.F.R. § 1910.1000 (1989) (listing over 350 toxic substances).

19. 886 F.2d 871 (7th Cir. 1989), *cert. granted*, 110 S. Ct. 1552 (1990).

20. It has been estimated that fetal protection policies may effect nearly "20,000,000 jobs in the United States." Interpretive Guidelines, *supra* note 15, at 7514; *see also* Note, *The Fetus As Business Customer In The Toxic Workplace: Wright v. Olin Corp. Sets Standards For Fetal Protection Programs*, 1984 DET. C.L. REV. 973, 977.

21. *See supra* note 2 and accompanying text.

22. *See supra* notes 6-7 and accompanying text.

II. FACTUAL SUMMARY

In 1982 Johnson Controls adopted a fetal protection policy that excluded "women with childbearing capacity"[23] from initial employment or transfer into jobs in which lead levels exceeded OSHA specifications.[24] This policy applied only to Johnson Controls' Battery Division and was established in an effort to prevent fetal exposure to lead, a component of batteries and a substance known to cause fetal harm.[25] Because the manufacturing of batteries requires the use of lead, Johnson Controls, and its predecessor Globe Union, had initiated a large number of innovative programs in an attempt to control and regulate all employee's exposure to lead. Even with these protective programs, however, the exposure to lead could not be reduced to acceptable levels for women who may become pregnant.[26] The most recent medical evidence established that lead exposure *in utero* presented a substantial health risk to the unborn child.[27]

Prior to adopting its fetal protection policy, the manufacturer considered alternatives to the exclusion of women with childbearing capacity from high lead exposure positions, but found no alternatives that would adequately protect the unborn child from the risks associated with excessive lead exposure.[28] The manufacturer's experience showed

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23. The fetal protection policy defines women of childbearing capacity as: "all women except those whose inability to bear children is medically documented." *Johnson Controls*, 886 F.2d at 876 n.8.

24. *Id.* OSHA has established standards for employee exposure to lead. The agency has stated that in order to prevent adverse effects the worker should not have a blood lead level of greater than 40 micro-grams per 100 grams. If the worker, male or female, plans to become a parent in the near future, the level should remain below 30 micro-grams per 100 grams. 29 C.F.R. § 1910.1025, App. C(II) (1989).

"While OSHA blood lead regulations utilized the measure of micro-grams per 100 grams and Johnson controls' standard uses the measure of micro-grams per deciliter, the parties have treated these measures as equivalent and [the court will] treat them [as equivalent]." *Id.* at 876 n.7.

In response to the exclusionary policy Judge Posner, dissenting, stated that the policy meant that "*no* fertile woman can be hired for a job in which *any* employee has had a blood lead level exceeding 30 micro-grams per deciliter *anytime* during the last year, or in *any* job that might lead to a promotion to such a job." *Johnson Controls*, 886 F.2d at 919 (Posner, J., dissenting). Judge Posner also noted that hiring offices were advised to inform women that "we have no openings for women capable of bearing children." *Id.*

25. *Id.* at 875-76.

26. *Id.* at 875.

27. *Id.* at 880.

28. *Id.* at 878.

that the voluntary exclusion program was ineffective in that six employees became pregnant while working in the high lead areas.[29]

In *Johnson Controls,* several UAW local unions and a group of individual employees brought suit in the United States District Court for the Eastern District of Wisconsin, alleging that this policy violated Title VII.[30] The district court granted the employer's motion for summary judgment, and the unions and employees appealed.[31] Following a hearing and then a rehearing *en banc,* the Court of Appeals for the Seventh Circuit affirmed the district court's summary judgment.[32] The court upheld the fetal protection policy because it relied on scientific data indicating that risk of harm to a fetus was confined primarily to women, there was no less discriminatory alternative, and the policy was reasonably necessary to industrial safety. The court believed that based upon the facts of this case, the fetal protection policy could be upheld legally under both the business necessity defense[33] and under the bona fide occupational qualification defense.[34]

III. LEGAL BACKGROUND

The Seventh Circuit, in *Johnson Controls,* is not the first federal appellate court to deal with a case involving the conflict between a woman's right to choose her employment and an employer's right to exclude the woman to protect the unborn child.[35] When Congress

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29. *Id.* at 876-77. Judge Posner's dissenting opinion stated that eight women became pregnant while working in high lead exposure positions. *Id.* at 913.

30. *Id.* at 874.

31. *Id.*

32. *Id.* at 874-75.

33. The business necessity defense is a judicially created defense to Title VII claims. The defense requires that the employer show that a challenged facially neutral job criteria that adversely effects a protected class has a relationship to actual job performance. *See infra* notes 59-66 and accompanying text.

34. The bona fide occupational qualification is a statutory exception to Title VII which is allowed if the employer shows that its business would be undermined if not allowed to hire only one sex. *See infra* notes 48-52 and accompanying text.

35. Several courts have dealt with this issue. *See, e.g.,* Hayes v. Shelby Memorial Hosp., 726 F.2d 1543 (11th Cir. 1984) (woman x-ray technician discharged when she became pregnant); Wright v. Olin Corp., 697 F.2d 1172 (4th Cir. 1982) (company policy excluding women from all jobs with exposure to known or suspected abortifacient or teratogenic agents); Zuniga v. Kleberg County Hosp., 692 F.2d 986 (5th Cir. 1982) (woman x-ray technician discharged when she became pregnant); Doerr v. B.F. Goodrich Co., 484 F. Supp. 320 (N.D. Ohio 1979) (company policy excluded women from jobs involving exposure to

enacted the Pregnancy Amendment to Title VII in 1978,[36] it expressly protected women's employment rights against discrimination based upon "pregnancy, childbirth, or related medical conditions."[37] Nevertheless, employers have continued to develop fetal protection policies which work to exclude women from certain jobs.[38]

The Supreme Court has recognized two theories under which Title VII claimants may attempt to prove employment discrimination: disparate treatment,[39] and disparate impact.[40] Under each theory "the ultimate burden of proving that discrimination against a protected group has been caused by a specific employment practice remains with the plaintiff at all times."[41]

Disparate treatment occurs when an employer adopts a practice that classifies an employee on a basis not actually prohibited by Title VII, which the employee alleges is merely a pretense raised to hide unlawful discrimination.[42] Disparate treatment occurs in two ways. First, a prima facie case of discrimination can be shown by mere proof of the existence of a policy or practice that treats a "protected class"[43] of employees or would-be employees less favorably than workers not within the class.[44] A second way of establishing disparate treatment is by inference that the employer intended to treat the employees less favorably because of their sex, race, age, or other protected status.[45]

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vinyl chloride).

36. *See supra* notes 6-7 and accompanying text.

37. 42 U.S.C. § 2000e(k) (1982).

38. *See, e.g.,* Timko, *Exploring the Limits of Legal Duty: A Union's Responsibilities With Respect To Fetal Protection Policies*, 23 HARV. J. ON LEGIS. 159 (1986).

39. *See* McDonnell Douglas Corp. v. Green, 411 U.S. 792, 801-02 (1973).

40. *See* Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971).

41. Watson v. Fort Worth Bank & Trust Co., 487 U.S. 977 (1988).

42. *See, e.g, McDonnell Douglas Corp.*, 411 U.S. at 794-96 (employer refusal to rehire black employee because of past criminal conduct may be pretext for race discrimination).

43. In the instant case, the protected class was all fertile women.

44. *See, e.g.*, Los Angeles Dep't of Water & Power v. Manhart, 435 U.S. 702, 704 (1978) (policy requiring larger contributions from female employees than male employees into the employer's pension fund, simply because women as a class live longer, is a violation of Title VII).

45. In McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), the Supreme Court set forth the following requirements necessary for the plaintiff to establish a prima facie claim of disparate treatment through inference:

> (i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to

Once established, the burden shifts to the employer to rebut by showing a "legitimate nondiscriminatory reason" for the exclusion.[46] If the employer can meet this burden, the claimant must then prove that the reason given by the employer is a mere pretext for discriminatory intent.[47]

Title VII expressly provides an employer only one exception to the general rule in cases involving this overt discrimination. The exception arises when religion, sex, or national origin is a "bona fide occupational qualification reasonably necessary to the normal operation of [the] particular business or enterprise."[48] The bona fide occupational qualification defense (BFOQ) is a statutory exception to Title VII.[49] The BFOQ defense allows an employer to hire individuals from only one sex providing the employer can show "the *essence* of the business operation would be undermined by not hiring members of one sex exclusively."[50] The Supreme Court in *Dothard v. Rawlinson*,[51] interpreted this exception narrowly, stating "an employer [can] rely on the bfoq exception only by proving 'that he had reasonable cause to believe, that is, a factual basis for believing, that all or substantially all women would be *unable to perform safely and efficiently the duties of the job involved.*'"[52]

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seek applicants from persons of complainant's qualifications.

Id. at 802.

46. *Id.*

47. *Id.* at 804. Proof of discriminatory motive is necessary in order to find an employer guilty of disparate treatment. *Id.*

48. 42 U.S.C. § 2000e-2(e) (1982).

> Notwithstanding any other provision of this subchapter, (1) it shall not be an unlawful employment practice for an employer to hire and employ employees . . . on the basis of his religion, sex, or national origin in those certain instances where religion, sex or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise . . . .

Id.

49. The BFOQ defense is established at 42 U.S.C. § 2000e-2(e):

> Notwithstanding any other provisions of this subchapter, (1) it shall not be an unlawful employment practice for an employer to hire and employee employees . . . on the basis of his religion, sex, or national origin in those certain instances where religion, sex, or national origin in a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise . . . .

Id.

50. Dothard v. Rawlinson, 433 U.S. 321, 333 (1977) (quoting Diaz v. Pan Am. World Airways, 442 F.2d 385, 388 (5th Cir. 1971)).

51. 433 U.S. 321 (1977).

52. *Id.* at 333 (quoting Weeks v. Southern Bell Tel. & Tel. Co., 408 F.2d 228,

Under the disparate impact theory, an employer violates Title VII by adopting a facially neutral policy that does not differentiate on the basis of a particular class, but nonetheless has a disproportionate, adverse effect on a class protected by Title VII.[53] Although such practices are not intentionally discriminatory, they act to perpetuate the effects of discrimination and are therefore invalid under Title VII. The Supreme Court first considered disparate impact analysis in *Griggs v. Duke Power Co.*,[54] which extended Title VII to cover practices which are "fair in form, but discriminatory in operation."[55] In *Nashville Gas Co. v. Satty*,[56] the Court found that despite the facial neutrality of the employer's policy, which allowed both male and female employees to retain their accumulated seniority while on leave for nonoccupational disabilities other than pregnancy, it deprived women employees of employment opportunities and acted to "adversely affect [their] status as an employee" due to their sex.[57]

Although disparate treatment and disparate impact appear much the same, a charge of disparate treatment requires consideration of intent, while a charge of disparate impact requires the court to look at the consequences of a facially neutral policy.[58]

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235 (5th Cir. 1969)) (emphasis added).

53. *See, e.g.*, New York City Transit Auth. v. Beazer, 440 U.S. 568, 587 (1979) (policy of not hiring methadone users is not a prima facie violation of Title VII because disproportionate numbers of blacks and Hispanics are excluded from consideration).

54. 401 U.S. 424 (1971). In *Griggs*, black employees challenged the employer's requirement that employees possess a high school diploma or obtain satisfactory scores on standardized intelligence tests. The employees claimed that neither requirement was significantly related to job performance and operated disproportionately against blacks. *Id.* at 428.

55. *Id.* at 431.

56. 434 U.S. 136, 139-40 (1977) (the Court found disparate treatment when the employer required pregnant employees to take a leave of absence during which the employee received no sick pay, even though other employees received sick pay and the pregnant employee lost all accumulated seniority while other employees did not).

57. *Id.* at 140 (quoting 42 U.S.C. § 2000e-2(a)(2) (1970 & Supp. V)). The court ruled that the exclusion of pregnancy from the general leave of absence provisions was a "pretext[] designed to effect an invidious discrimination against the members of one sex." *Id.* at 145 (quoting General Elec. Co. v. Gilbert, 429 U.S. 125, 135 (1976) (quoting Geduldig v. Aiello, 417 U.S. 484, 496-97 (1974))).

58. *See* Griggs v. Duke Power Co., 401 U.S. 424, 432 (1971) ("[G]ood intent or absence of discriminatory intent does not redeem employment procedures . . . that operate as 'built in headwinds' for minority groups . . . Congress directed the thrust of the Act to the *consequences* of employment practices, not simply the motivation.").

In *Griggs v. Duke Power Co.*,[59] the Supreme Court created the business necessity defense.[60] This judicially created defense provides the defendant employer with a defense to Title VII claims of disparate impact discrimination. The defense requires that the employer show that the challenged neutral job criteria has a manifest relationship to actual job performance. The Supreme Court in *Dothard v. Rawlinson*,[61] expanded the job-relatedness concept when it stated "a discriminatory employment practice must be shown to be necessary to safe and efficient job performance to survive a Title VII challenge."[62] This expanded concept seems to uphold other court decisions which have held that if the employer can show that, although there is an adverse impact upon a protected group, its program relates to an "overriding legitimate business purpose such that the practice is necessary to the safe and efficient operation of the business"[63] it will not violate Title VII.

Recently, in *Wards Cove Packing Co. v. Atonio*,[64] the Supreme Court stated that "at the justification stage . . . [of a business necessity defense] the dispositive issue is whether a challenged practice serves, in a significant way, the legitimate employment goals of the employer."[65] Once the employer demonstrates a reasonable business necessity, the complainant may then rebut by proving that other options exist which would reasonably meet the employers goals without the objectionable discriminatory effect.[66]

The legislative history of the pregnancy amendment to Title VII shows that Congress intended for the employer to use the BFOQ defense only in cases where the discrimination is related to childbearing capabilities.[67] During discussion on the amendment, Senator Williams,

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59. 401 U.S. 424 (1971).

60. "The touchstone is business necessity. If an employment practice which operates to exclude [protected class] cannot be shown to be related to job performance, the practice is prohibited." *Id.* at 431.

61. 433 U.S. 321 (1977).

62. *Id.* at 332 n.14.

63. Robinson v. Lorillard Corp., 444 F.2d 791, 798 (4th Cir.), *cert. dismissed*, 404 U.S. 1006 (1971).

64. 109 S. Ct. 2115 (1989).

65. *Id.* at 2125-26.

66. Albermarle Paper Co. v. Moody, 422 U.S. 405, 425 (1975); *Wards Cove Packing Co.*, 109 S. Ct. at 2126-27 ("If [plaintiffs] . . . come forward with alternatives to [the employers'] hiring practices that reduce the . . . impact of practices currently being used, and [the employers] refuse to adopt these alternatives, such a refusal would belie a claim by [plaintiffs] that their incumbent practices are being employed for nondiscriminatory reasons.")

67. "The amendment renders any policies based on or related to pregnancy 'subject to the same scrutiny on the same terms as other acts of sex discrimina-

one of the bill's sponsors, stated "the overall effect of discrimination against women because they might become pregnant, or do become pregnant, is to relegate women in general, and pregnant women in particular, to a second-class status with regard to career advancement and continuity of employment and wages."[68] Although it appears that a fetal protection program is overtly discriminatory, in that it affects only women on the basis of the ability to have children, and thus should be decided upon the employer's ability to use the BFOQ defense, these cases typically have been decided using the disparate impact analysis.[69]

The three most recent cases which deal with fetal vulnerability considerations are *Hayes v. Shelby Memorial Hospital*,[70] *Wright v. Olin Corp.*,[71] and *Zuniga v. Kleberg County Hospital*.[72] Each of these cases applied the disparate impact/business necessity analysis in determining whether the policy to exclude women from certain jobs was valid. This analysis was used although the policies challenged were clearly overtly discriminatory. In *Zuniga*, the Fifth Circuit considered the hospital's argument that the business necessity defense applied based upon the potential harm to the fetus from radiation exposure, and the potential future liability that the hospital could encounter.[73] The court noted that although the Supreme Court in *Dothard* had only implied that the business necessity defense extends beyond job-relatedness, the Fourth Circuit in *Robinson v. Lorillard Corp.*,[74] indicated that the scope of the

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tion proscribed in the existing statute.'" Note, *supra* note 12, at 1081 (quoting H.R. REP. NO. 948, 95th Cong., 2d Sess. 4, *reprinted in* 1978 U.S. CODE CONG. & ADMIN. NEWS 4749, 4752).

68. 123 CONG. REC. 29,385 (1977). For a comprehensive review of the legislative history of the Pregnancy Amendment to Title VII, see Note, *supra* note 12, at 1068-82.

69. *See, e.g.*, Hayes v. Shelby Memorial Hosp., 726 F.2d 1543 (11th Cir.), *reh'g denied*, 732 F.2d 944 (1984); Wright v. Olin Corp., 697 F.2d 1172 (4th Cir. 1982); Zuniga v. Kleberg County Hosp., 692 F.2d 986 (5th Cir. 1982).

70. 726 F.2d at 1546, *reh'g denied*, 732 F.2d 944 (1984) (hospital terminated a pregnant woman's employment immediately after she informed her supervisor that she was pregnant).

71. 697 F.2d at 1182 (fetal vulnerability program excluded women from certain jobs).

72. 692 F.2d at 988 (x-ray technician was forced to resign when she became pregnant).

73. *Id.* at 991.

74. 444 F.2d 791 (4th Cir.), *cert. dismissed*, 404 U.S. 1006 (1971) (class action under Title VII which challenged a racially discriminatory seniority system). In *Robinson*, the Fourth Circuit interpreted the business necessity defense to include safety and efficiency of the business operation when it stated:

defense may be larger.[75] The *Zuniga* Court recognized that a link does exist between the economic consequences of legal actions and the *Robinson* standard of "safe and efficient operation of the business."[76] The court decided that even if the defense did extend to the protection of fetuses from harm and avoidance of liability, the hospital's failure to consider other available alternatives would rebut the defense.[77]

In *Wright*, the Fourth Circuit considered the employer's defense of its exclusionary policy. The employer sought to defend its fetal vulnerability program which restricted any fertile woman from working in a job which "may require contact with and exposure to known or suspected abortifacient or teratogenic agents,"[78] by using the business necessity defense. Olin claimed that the exclusionary program was necessary in order to protect the fetus from exposure to toxic chemicals used in the manufacturing process. In determining whether the business necessity defense applied to the fetal vulnerability program, despite the adverse impact upon female employees, the court concentrated on whether fetal protection justified such an employment practice.[79] The Court reasoned that societal interests, reflected in laws requiring the employer to protect the health of employees and their families, could provide a basis for the business necessity defense.[80]

> The test is whether there exists an overriding legitimate business purpose such that the practice is necessary to the safe and efficient operation of the business. Thus, the business purpose must be sufficiently compelling to override any racial impact; the challenged practice must effectively carry out the business purpose it is alleged to serve; and there must be available no acceptable alternative policies or practices which would better accomplish the business purpose advanced or accomplish it equally well with lesser differential racial impact.

Id. at 798 (footnotes omitted).

75. *Zuniga*, 692 F.2d at 991-92; *see supra* notes 59-66 and accompanying text.

76. *Zuniga*, 692 F.2d at 992 n.10 (quoting *Robinson*, 444 F.2d at 798). "[T]he economic consequences of a tort suit brought against the Hospital by a congenitally malformed child could be financially devastating, seriously disrupting the 'safe and efficient operation of the business.'" *Id.*

77. *Id.* at 992.

78. *Wright*, 697 F.2d at 1182.

79. *Id.* at 1188.

80. *Id.* at 1189-90, 1190 n.26. The court cited: Occupational Safety and Health Act, 29 U.S.C. §§ 651-678 (1985); Consumer Product Safety Act, 15 U.S.C. §§ 2051-2083 (1982); Federal Food, Drug, and Cosmetic Act, 21 U.S.C. §§ 301-392 (1982), as examples of national laws requiring employers to protect the health of employees and their families. *Wright*, 697 F.2d at 1190 n.26.

Recognizing that on its face the fetal protection policy looked overtly discriminatory, the court decided to treat the policy as facially neutral in order to allow the employer to use the business necessity defense. The court then defined the defense as requiring satisfaction of the following two elements, in the context of a fetal protection policy: "(1) that there is a substantial risk of harm to the fetus or potential offspring of women employees from the women's exposure, either during pregnancy or while fertile, to toxic hazards in the workplace and (2) that the hazard applies to fertile or pregnant women, but not to men."[81]

Providing these two elements were present, the employer could use the business necessity defense. The Court held that "under appropriate circumstances an employer may, as a matter of business necessity, impose otherwise impermissible restrictions . . . that are reasonably required to protect the health of unborn children of women workers against hazards of the workplace."[82]

In *Hayes*, the Eleventh Circuit analyzed the case under the disparate impact theory using the elements outlined by the Fourth Circuit[83] to establish that the involved policy was facially neutral and not overtly discriminatory.[84] The theory underlying the facial neutrality analysis utilized is that a policy meeting the above criteria "is neutral in the sense that it effectively and equally protects the offspring of all employees."[85]

Without the use of this analysis, the employer would be required to use the traditional overt discrimination analysis and the bona fide occupational defense would be the only available defense.[86] If the employer was only allowed the bona fide occupational defense, the employer would be required to present evidence showing that the excluded class was unable to perform the duties of that particular job.[87]

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81. Hayes v. Shelby Memorial Hosp., 726 F.2d 1543, 1548 (11th Cir. 1984), *reh'g denied*, 732 F.2d 944 (1984); *see Wright*, 697 F.2d at 1190.

82. *Wright*, 697 F.2d at 1189-90. Upon remand, the district court implemented the disparate impact/business necessity analysis and found that because Olin had considered, but rejected other alternatives for protecting the fertile women, the plaintiff failed to rebut the employer's business necessity defense. Wright v. Olin Corp., 585 F. Supp. 1447 (W.D.N.C.), *vacated*, 767 F.2d 915 (4th Cir. 1984). The district court concluded: "An employer such as Olin can justifiably choose a policy of fetal protection as a moral obligation to protect the next generation from injury, and it is a social good that should be encouraged and not penalized." *Id.* at 1453.

83. *See supra* note 81 and accompanying text.

84. *Hayes*, 726 F.2d at 1548.

85. *Id.*

86. *Id.* at 1549.

87. *Id.*

The *Hayes* Court ruled that the hospital's policy clearly had a disproportionate impact on female employees.[88] It would, however, only allow the business necessity defense to be used based upon a genuine desire to promote fetal health.[89] In rejecting the hospital's contention that potential liability could form the basis of a business necessity defense, the Court stated "potential liability is too contingent and too broad a factor to amount to a business necessity."[90] The Court held that the employer had not met its burden of proof because of inconsistency between the hospital's desire to avoid perceived potential liabilities and the genuine concerns for the fetus.[91] In addition, the Court concluded that the employee had rebutted the business necessity defense because the hospital had failed to consider acceptable alternatives which would have minimized radiation exposure to the pregnant employee.[92]

Following the *Wright* and *Hayes* decisions, the EEOC considered whether the business necessity defense applies when discrimination charges are made against an employer using a fetal protection program. The EEOC did not endorse the Fourth and Eleventh Circuit, but did allow that the business necessity defense could apply in these particular types of overt discrimination cases. The EEOC did not agree that fetal protection policies should be considered as disparate impact cases when they clearly impacted women.[93]

The *Johnson* Court followed the Fourth Circuit and the Eleventh Circuit in determining that a fetal protection policy could be analyzed under the disparate impact theory, but it went further and also considered whether the policy could be upheld under the bona fide occupational qualification theory.

IV. THE *JOHNSON CONTROLS* DECISION

The court in *Johnson Controls*[94] first considered the information submitted by the employer Johnson Controls as to the reasons for implementing the policy which barred women with childbearing capacity from working in high lead exposure positions. Johnson Controls had implemented over fifteen million dollars in environmental controls at its battery division plants which included a lead hygiene program,

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88. *Id.* at 1549-50.

89. *Id.* at 1553 n.15.

90. *Id.*

91. *Id.*

92. *Id.* at 1553-54.

93. *Policy Statement on Reproductive and Fetal Hazards Under Title VII*, 401 Fair Empl. Prac. Man. (BNA) ¶ 6013 (Oct. 7, 1988).

94. 886 F.2d 871 (7th Cir. 1989), *cert. granted*, 110 S. Ct. 1552 (1990).

respirator program, and biological monitoring program.[95] Even with these established controls the blood lead levels could possibly exceed thirty micrograms per deciliter which is greater than the standard set by the Centers for Disease Control as excessive for children.[96] The court believed that a "[p]roper analysis of the Title VII issues [which] this case presents require[s] a thorough understanding of the following fundamental question: Does lead pose a health risk to the offspring of Johnson's female employees?"[97] The record presented to the court established that there was clearly a substantial risk of harm to the fetus[98] and that "once lead is deposited in a mother's blood, it crosses the placenta and affects her unborn child . . . which is medically judged to be at least as sensitive, and, indeed, is probably even more sensitive to lead than the young child."[99]

The court noted that the Centers for Disease Control had taken the position that "[t]he prevention of lead exposure to the fetus needs special emphasis. Women of childbearing age should be excluded from working at jobs where significant lead exposure occurs."[100] Evidence submitted showed that lead accumulates and is stored in the body following exposure and thus even a woman who was not continually exposed to lead could conceivably expose future offspring.[101] After reviewing the evidence before it the court held that "[t]he overwhelming evidence in this record establishes that an unborn child's exposure to lead creates a substantial health risk . . . [which] clearly approaches a 'general consensus within the scientific community.'"[102]

Once the court found that there was a significant scientific risk to the unborn child it determined the applicable legal standard. The court considered the Fourth Circuit decision in *Wright*[103] and the Eleventh Circuit's decision in *Hayes*[104] in which both courts, although through different reasoning, determined that a disparate impact/business necessity theory was available for use in a fetal protection policy case providing there was a substantial risk of injury to the fetus and that the

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95. *Id.* at 875.

96. *Id.* at 876 n.7.

97. *Id.* at 879.

98. *Id.*

99. *Id.* (quoting from the affidavit of J. Julian Chisholm, M.D.).

100. *Id.* at 880 (quoting CENTERS FOR DISEASE CONTROL, U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES, PREVENTING LEAD POISONING IN YOUNG CHILDREN 7, 20, 21 (1985)).

101. *Id.* at 882.

102. *Id.* at 883 (quoting Wright v. Olin Corp., 697 F.2d 1172, 1191 (4th Cir. 1982)).

103. *See supra* notes 78-82 and accompanying text.

104. *See supra* notes 83-92 and accompanying text.

transmission occurred only through women.[105] In addition, the *Johnson Controls* Court believed it had further support for the use of the disparate impact/business necessity theory since the EEOC[106] had endorsed the approaches taken by the Fourth and Eleventh Circuits.[107] The *Johnson* Court believed that the requirements providing that there be a substantial health risk to the unborn child, that the risk be confined to female employees, and that the employee be allowed to present less discriminatory alternatives would provide adequate protection from the "'[m]yths or purely habitual assumptions' that employers sometimes attempt to impermissibly utilize to support the exclusion of women from employment opportunities."[108] The Court, therefore, agreed with the "Fourth Circuit, Eleventh Circuit, and the EEOC that the business necessity defense [could] appropriately [be] applied to fetal protection policy cases under Title VII."[109]

The issue before the court was to determine whether the district court erred in granting summary judgment. First, the court noted that summary judgment is mandated only "after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which the party will bear the burden [of] proof at trial."[110] It then determined that, based upon the Supreme Court's decision in *Wards Cove Packing Co. v. Atonio*,[111] the plaintiff had the burden of

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105. *See supra* notes 80-82 and accompanying text.

106. The EEOC is the agency responsible for the administration of Title VII.

107. *See supra* note 93 and accompanying text. *Policy Statement on Reproductive and Fetal Hazards Under Title VII*, 401 Fair Empl. Prac. Man. (BNA) ¶ 6013 (Oct. 7, 1988):

> Although the BFOQ defense is normally the only one available in cases of overt discrimination, the Commission follows the lead of every court of appeals to have addressed the question [in determining] that the business necessity defense applied to these cases. While business necessity has traditionally been limited to disparate impact cases, there is an argument that in this narrow class of cases the defense should be flexibly applied.

Id. at ¶ 6014-15 (quoted in *Johnson*, 886 F.2d at 886).

108. *Johnson Controls*, 886 F.2d at 886 (quoting Los Angeles Dep't of Water & Power v. Manhart, 435 U.S. 702, 707 (1978)).

109. *Id.* at 887.

110. *Id.* at 888 (quoting Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986)).

111. 109 S. Ct. 2115 (1989). The *Atonio* Court stated:

> The employer carries the burden of producing evidence of a business justification for his employment practice. The burden of persuasion, however, remains with the disparate-impact plaintiff . . . . This rule conforms with the usual method for allocating persuasion and

persuasion.[112] Once the burden of persuasion had been allocated, the Court addressed the issue of whether UAW had "presented evidence sufficient to permit the district court to conclude that Johnson Controls' business necessity defense [could not] be factually supported."[113]

A. Business Necessity Defense

The Court used the test set forth in the Fourth and Eleventh Circuits to analyze whether UAW had met its burden to dispute Johnson Controls' business necessity defense:

> the employer must show (1) that there is a substantial risk of harm to the fetus or potential offspring of women employees from the women's exposure, either during pregnancy or while fertile, to toxic hazards in the workplace and (2) that the hazard applies to fertile or pregnant women, but not to men.[114]

Meeting the first part of the test was relatively easy. The Court found that both UAW and Johnson Controls agreed that there was a substantial risk of harm to the unborn child of a female worker exposed to lead and that the record presented to the court provided that overwhelming medical and scientific research demonstrated a substantial risk of harm.[115] The Court stated "it is not necessary to prove the existence of a general consensus on the [issue of fetal safety] within the qualified scientific community."[116] Instead, all that the employer must show "is so considerable a body of opinion that significant risk exists . . . that an informed employer could not responsibly fail to act on the assumption that this opinion might be the accurate one."[117] Therefore, Johnson Controls met this component of the test and there was "no genuine issue of material fact with respect to this [first] component."[118]

> production burdens in Federal courts, . . . and more specifically, it conforms to the rule in disparate-treatment cases that the plaintiff bears the burden of disproving an employer's assertion that the adverse employment action or practice was based solely on a legitimate neutral consideration.

Id. at 2126.

112. *Johnson Controls*, 886 F.2d at 888.

113. *Id.*

114. *Id.* at 885 (quoting Hayes v. Shelby Memorial Hosp., 726 F.2d 1543, 1548 (11th Cir. 1984)).

115. *Id.* at 888.

116. *Id.* (quoting *Wright*, 697 F.2d at 1191).

117. *Id.* at 888-89 (quoting *Wright*, 697 F.2d at 1191).

118. *Id.* at 889.

Meeting the second part of the test required fetal exposure transmitted only through women, and required much more consideration by the court. Again, the Court noted that it was not necessary to show a general consensus in the scientific community. The Court stated that "UAW witnesses posited that animal studies had demonstrated that there was a possible risk of genetic damage to human offspring as a result of male lead exposure."[119] The Court, however, discounted those studies because the record was devoid of human studies documenting genetic defects which resulted from male's exposure to lead.[120]

Johnson Controls' experts "testified that a male worker's exposure [to much higher amounts of lead] did not pose a substantial risk of genetically transmitted harm from the male to the unborn child."[121] The Court decided that the animal research evidence was not the "type of solid scientific data necessary for a reasonable factfinder to reach a non-speculative conclusion that a father's exposure to lead presents the same danger to the unborn child as that resulting from a female employee's exposure to lead."[122] Thus, Johnson Controls had met the two prong test upholding its use of the business necessity defense for its fetal protection policy and UAW had failed to present facts sufficient to dispute the validity of the policy.[123]

Once the court finds that the evidence presented supports the fetal protection policy, the complainant may rebut the evidence by showing "there are acceptable alternative policies or practices which would better accomplish the business purpose . . . [of protecting against the risk of harm], or accomplish equally well with a lesser differential . . . impact [between women and men workers]."[124] In the instant case UAW had failed to preserve the issue for appeal. The Court noted, however, that even if UAW had preserved the issue for appeal, it "would be constrained to hold that the UAW failed to present facts sufficient . . . to conclude that less discriminatory alternatives would equally effectively achieve [the] employer's legitimate purpose of protecting unborn children from the substantial risk of harm lead exposure creates,"[125] because UAW had failed to present any alternatives to the court.[126]

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119. *Id.*

120. *Id.*

121. *Id.*

122. *Id.* at 889-90. The *Johnson Controls* Court did not define the term "the same danger." We are therefore left to speculate on whether this means an "equally substantial danger" or literally "the same" danger.

123. *Id.* at 892-93.

124. *Id.* at 891 (quoting *Wright*, 697 F.2d at 1191 (quoting Robinson v. Lorillard Corp., 444 F.2d 791, 798 (4th Cir. 1971))).

125. *Id.* at 891.

126. *Id.* at 892.

B. Bona Fide Occupational Qualification Defense (BFOQ)

After determining that the business necessity defense was available to shield Johnson Controls fetal protection policy from liability for sex discrimination under Title VII, the Court proceeded to determine whether the policy could be upheld under the bona fide occupational qualification defense.[127]

The Seventh Circuit had recently addressed the use of a BFOQ defense in *Torres v. Wisconsin Deptartment of Health & Social Services*,[128] and used that case to analyze whether the defense was applicable in this present case. The Court had set forth a method for determining whether a BFOQ was valid: (1) it must focus on the particular business of the employer as it relates to other operations in the same business; (2) it must determine whether the goal of the employer was part of the essence of the business; and (3) it must determine whether the proposed BFOQ is necessary to further the goal.[129]

First, the Court determined that Johnson's business was "'unique' because it require[d] the use of lead, an extremely toxic substance that has been scientifically established to pose very serious dangers to young children, and, in particular, to the offspring of female employees."[130] The Court then established that "safety (preventing hazards to health) is legitimately part of the 'essence' of the 'business' of a battery manufacturer."[131] Next it considered whether the fetal protection policy was "'directly related' to industrial safety"[132] and determined that a policy protecting unborn children from permanent impairment resulting from exposure to the lead was indeed directly related to industrial safety.[133]

At this point, the Court addressed what it considered to be the most difficult question; That is "whether the proposed BFOQ [was] 'reasonably necessary' to [further] the objective of" industrial safety.[134] In resolving this question the Court reviewed the Title VII requirement that substantially all women be unable to perform the duties of the

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127. *Id.* at 893. The Seventh Circuit considered the BFOQ defense on its own as a means of justifying the employer's exclusionary policy.

128. 859 F.2d 1523, 1527-28, 1533 (7th Cir. 1988) (en banc) (the BFOQ defense was available to the department; its policy excluding men from guard positions in the living and hygiene areas of a women's prison was upheld).

129. *Johnson Controls*, 886 F.2d at 894-96.

130. *Id.* at 896.

131. *Id.*

132. *Id.*

133. *Id.*

134. *Id.* (quoting *Torres*, 859 F.2d at 1530).

job[135] in light of *Dothard v. Rawlinson.*[136] In *Dothard* the Supreme Court had stated "more is at stake in this case, however, than an individual woman's decision to weigh and accept the risks of employment."[137] The *Johnson* Court decided that, like *Dothard,* more was at stake in this case because a woman might discount the risk hoping that her infant would not be affected by the exposure. If injury then occurred to the infant, society would have to share the risks in the form of financial programs for the children born with physical and mental handicaps because of exposure to lead.[138] Therefore, the Court determined that *Dothard* supported, rather than denied, "a conclusion that an employer's fetal protection policy constitutes a bona fide occupational qualification."[139] The Court then ruled that Johnson Controls had met its burden to demonstrate that the policy is reasonably necessary to further its objective of industrial safety.[140]

Once the Court worked through this analysis it proclaimed "there can be no doubt that the exclusion of women who are actually pregnant from positions involving high levels of lead exposure sets forth a bona fide occupational qualification."[141] Furthermore, "Johnson Controls' well reasoned and scientifically documented decision to apply this policy to all fertile women employed in high lead exposure positions constitutes a bona fide occupational qualification."[142]

The Court concluded by affirming the summary judgment in favor of Johnson Controls. After reviewing this case the Court believed the business necessity defense should be applicable to a challenged fetal protection policy under Title VII. In this case, UAW had failed to meet its burden to defeat the defense. Furthermore, based upon the evidence submitted by Johnson Controls, the Court believed that the fetal

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135. Whether Johnson Controls "had reasonable cause to believe, that is, a factual basis for believing that all or substantially all [women capable of pregnancy] would be unable to perform safely and efficiently the duties of the job involved." *Id.* at 897 (quoting Dothard v. Rawlinson, 433 U.S. 321, 333 (1977) (quoting Weeks v. Southern Bell Tel. & Tel. Co., 408 F.2d 228, 235 (5th Cir. 1969))).

136. 433 U.S. 321 (1977). The Court determined that a bona fide occupational qualification excluding women from positions in a maximum security male prison was justified because a woman's sex could create a risk of sexual assaults which would undermine prison security. The female's sex would "directly undermine her capacity to provide the security that is the essence of a correctional counselor's responsibility." *Id.* at 336.

137. *Id.* at 335.

138. *Johnson Controls,* 886 F.2d at 897-98.

139. *Id.* at 898.

140. *Id.*

141. *Id.*

142. *Id.*

protection policy was reasonably necessary to industrial safety and thus could be upheld even if the bona fide occupational qualification defense was applied to this matter.[143]

V. ANALYSIS

One of the primary purposes of Title VII, and the Pregnancy Amendment to it, was to protect women from exclusionary policies instituted by employers which force women to remain in low paying, traditional jobs. Prior to Title VII women were often "protected" from the hazards of work[144] based upon the mistaken assumption that because of a woman's childbearing capacity she was unfit for certain types of jobs. These jobs were often the traditional male, blue-collar type jobs.[145] In 1908 the Supreme Court, in *Muller v. Oregon*,[146] upheld a limitation on the work hours of women based upon the belief that "healthy mothers are essential to vigorous offspring, [and] the physical well-being of [the] woman becomes an object of public interest and care in order to preserve the strength and vigor of the race."[147] In *Muller*, the Court noted that the restrictions were not solely for the benefit of the woman, but rather "for the benefit of all."[148]

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143. *Id.* at 901.

144. *See, e.g.*, J. BAER, THE CHAINS OF PROTECTION (1978), in which the author notes that women were prohibited from entering certain occupations such as mining, smelting, bartending or even working in places where liquor was served, and jobs which required the cleaning of moving machinery. *Id.* at 31. Many laws limited the number of hours a woman could work or the amount of weight she could lift in certain establishments such as "manufacturing, mechanical and mercantile establishments, hotels, and restaurants." *Id.* at 54. The result of these laws made it much more beneficial for employers to hire men because they could work longer hours. Often the laws made it illegal for women to work at night. *Id.* at 79-88.

However, as noted by J. STELLMAN, WOMEN'S WORK, WOMEN'S HEALTH (1977), this legislation is contradictory because "with hardly an exception, the restrictions against lifting heavy weights and night hours of work excluded coverage for those very jobs in which women were essential and needed protection. Hospital workers were permitted to work at night, and waitresses were allowed to lift heavy trays." *Id.* at 176-77.

145. *See, e.g*, J. STELLMAN, *supra* note 144; Becker, *supra* note 16.

146. 208 U.S. 412 (1908).

147. *Muller*, 208 U.S. at 421 (upholding an Oregon statute prohibiting the employment of any woman for more than ten hours a day in any mechanical establishment, factory or laundry).

148. *Id.* at 422. The Court further expressed the belief that a woman's natural dependency upon man required that she look to the man for protection. *Id.*

Congress essentially overruled *Muller* when it passed the Pregnancy Amendment to Title VII, and federal and state court decisions have reached the same result in invalidating protective labor laws which prohibit women from working in particular jobs or limit women in other ways.[149] The Fifth Circuit in *Weeks v. Southern Bell Telephone & Telegraph Co.*,[150] made the following statement:

> Title VII rejects . . . romantic paternalism as unduly Victorian and instead vests individual women with the power to decide whether or not to take on unromantic tasks. Men have always had the right to determine whether the incremental increase in remuneration for strenuous, dangerous, obnoxious, boring or unromantic tasks is worth the candle. The promise of Title VII is that women are now to be on equal footing.[151]

This means that if men are permitted to assume the risks of employment in an unhealthy environment, women should be, and are to be, allowed that same right.[152]

The *Johnson Controls* Court appears to endorse the idea that an employer may promulgate an exclusionary policy which limits women's employment opportunities without allowing the women involved the same right as a man in deciding whether to assume the risk of employment in an unhealthy environment. The court, and the employers who promulgate these policies, are in essence asserting that the interests of the potential fetus rank above those of the mother/worker and that this limitation on women is a small price for women to pay. The court, in upholding, and the employer, in promulgating the exclusionary policy, are informing women that they are not competent

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It should be noted that during this period of time no state passed a statute banning women from working more than 10 hours in any job that women traditionally held, such as hospital workers. *See supra* notes 144-45 and accompanying text.

149. *See, e.g.*, Krause v. Sacramento Inn, 479 F.2d 988 (9th Cir. 1973) (job prohibition law); Kober v. Westinghouse Elec. Corp., 325 F. Supp. 467 (W.D. Pa. 1971) (hours law), *aff'd*, 480 F.2d 240 (3d Cir. 1973); Ridinger v. General Motors Corp., 325 F. Supp. 1089 (S.D. Ohio 1971) (job prohibition, weight and hour laws), *rev'd on other grounds*, 474 F.2d 949 (6th Cir. 1972).

150. 408 F.2d 228 (5th Cir. 1969).

151. *Id.* at 236.

152. *See* Dothard v. Rawlinson, 433 U.S. 321 (1977), where the Court stated that "the argument that a particular job is too dangerous for women may appropriately be met by the rejoinder that it is the purpose of Title VII to allow the individual woman to make that choice for herself." *Id.* at 335 (footnote omitted).

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to make the necessary decisions relating to their employment and health.[153]

In *Johnson Controls*, the employer's primary concern was "protecting pregnant women and their unborn children from dangerous blood lead levels."[154] The court first established that industrial safety and protecting its workers was indeed a legitimate part of the business of any manufacturing enterprise. The court then believed that it was a logical step to say that a policy protecting the unborn children of its workers from exposure to toxic chemicals directly relates to industrial safety and is therefore a legitimate part of the business.

Men, however, presumably make up the majority of the company's workers and yet the company's policy protected only pregnant women and their unborn children. The policy makes no mention of the protection of the unborn children of men. If protecting the unborn children of its workers is indeed related to industrial safety, the policy should also include men and their unborn children.

A. Use of the Business Necessity Defense

Although application of the business necessity defense to fetal protection policies is relatively new, the court adopts the *Wright-Hayes*[155] approach allowing use of the defense in the narrow class of cases which relate to fetal protection policies. The dissenting opinions did not agree that the business necessity defense applied to these cases, stating at one point "[I]t is unfortunate that the majority gives a new life of sorts to the result-oriented gimmickry of *Wright v. Olson Corp.*"[156] The dissenting judges further noted that the statute only

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153. *See, e.g., Johnson Controls*, 886 F.2d 871. In *Johnson Controls*, the majority opinion stated "it would not be improbable that a female employee might somehow rationally discount this clear risk in her hope and belief that her infant would not be adversely affected from lead exposure." *Id.* at 897.

The dissenting opinion by Judge Posner stated "There are plenty of selfish and irresponsible parents, not all of whom are male. A fetal protection policy is less paternalistic than a maximum-hours law." *Id.* at 906 (Posner, J., dissenting).

It should be noted that Judge Easterbrook, dissenting, did not agree with the majority or Judge Posner. He noted: "Such laws [i.e., protective legislation] also treat women in a stereotypical way. State laws requiring or allowing employers to treat women differently, on the assumption that women are less able than men to take the precautions essential for healthy children, are preempted by Title VII." *Id.* at 912 (Easterbrook, J., dissenting).

154. *Johnson Controls*, 886 F.2d at 876.

155. *See supra* notes 78-92 and accompanying text.

156. *Johnson Controls*, 886 F.2d at 902 (Cudahy, J., dissenting).

allows use of the bona fide occupational qualification defense in cases in which sex is the basis for exclusion.[157]

The business necessity defense traditionally applies only in cases where a policy is facially neutral, but results in a disparate impact upon one group.[158] The court in *Johnson Controls* appeared to agree with the *Wright* and *Hayes* courts that although the fetal protection policy looks overtly discriminatory, no theory under Title VII directly applies to these policies. Thus, since there was no directly applicable theory and the policy "involves motivations and consequences most closely resembling a disparate impact case"[159] the employer should be allowed to justify its policy under the much broader business necessity defense.

The flaw in this analysis is that the fetal protection policy is not facially neutral, but rather overtly discriminatory and the employer should not be given the opportunity to defend its discriminatory practice under the business necessity defense. Congress adopted Title VII and the Pregnancy Amendment to protect women from discrimination based upon childbearing capabilities. The exclusion of women from the workplace definitely discriminates on this basis and should thus be allowed only when there is a bona fide occupational qualification.

B. Danger of Lead Exposure to Males

No one will contradict the courts finding that lead poses a substantial risk of harm to unborn children. The court, however, failed to consider the plaintiff's evidence that male workers suffer genetic damage which may also result in serious consequences to their offspring.[160] The court brushed aside these test results because the data dealt with animal studies and not human studies.[161]

The position taken by the majority is difficult to justify when the court first accepts the OSHA standards[162] as a basis for determining that Johnson Controls' blood lead standard was valid and then states that animal studies are scientifically unconvincing. OSHA's standards are based on those very animal studies that the court brushes aside as scientifically unconvincing as to the effects on male reproductive risks.[163] Furthermore, the OSHA standards state that "exposure to lead can have serious effects on reproductive function in *both males* and

157. *Id.*
158. *See supra* notes 59-66 and accompanying text.
159. *Johnson Controls*, 886 F.2d at 884 (quoting *Wright*, 697 F.2d at 1186).
160. *Id.* at 919.
161. *Id.* at 889.
162. 29 C.F.R. § 1910 (1989).
163. *Johnson Controls*, 886 F.2d at 919.

females;"[164] yet the court totally ignored this evidence. The court seems to be saying that these studies are valid as they pertain to the potential risks involved with the exposure to lead in females, but these same tests are invalid as they relate to males.

The dissenting opinion correctly asserts that "a court [should not] reject [animal studies], as my colleagues do, on the ground that as a matter of law animal studies are not 'solid scientific data.'. . . Often animal studies are the best foundation for decision . . . [and] [t]he Supreme Court has concluded that they may be used."[165] In fact most of the information available regarding effects of toxic substances on reproductive capacity are limited to maternal exposure,[166] and many such tests are conducted using animals.[167]

By failing to consider the animal studies the court was able to conclude that the exposure to the child was confined to female employees; therefore, the policy met the second element of the business necessity defense. Had the court considered these tests it may not have found that women were the only source for exposure to the unborn child. After this decision it may be possible that only women will be singled out to protect future offspring, when men may actually be subjecting their future offspring to equally hazardous risks. Or perhaps it may enable a plaintiff to argue that the first element cannot be met because animal tests are too speculative to base a decision regarding whether there is substantial risk of harm to a fetus from either sex.

C. Less Discriminatory Alternative

The plaintiffs failed to respond to the employer's contention that there were no less discriminatory alternatives, thus the issue was not

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164. 29 C.F.R. § 1910.1025 (1989) (emphasis added).

> In male workers exposed to lead there can be a . . . decreased ability to produce healthy sperm, and sterility. . . . Malformed sperm (teratospermia), decreased number of sperm (hypospermia), and sperm with decreased motility (asthenospermia) can all occur. . . . Germ cells can be affected by lead and cause genetic damage in the egg or sperm cells before conception and result in failure to implant, miscarriage, stillbirth, or birth defects.

Id.

165. *Johnson Controls*, 886 F.2d at 919 (Easterbrook, J., dissenting) (citing Industrial Union Dep't v. American Petroleum Inst., 448 U.S. 607 (1980) (upholding the use of animal studies to formulate a decision)).

166. *See* Williams, *supra* note 11, at 658.

167. The EPA has stated in its Reproduction and Fertility Testing Guidelines that "the test substance is to be administered to . . . animals [and that] the rat is the preferred species." 40 C.F.R. § 798.4700(b), (c) (1989).

preserved for appeal.[168] As the court noted, the plaintiff has the burden of showing that "less discriminatory alternatives would equally effectively achieve an employer's legitimate purpose of protecting unborn children."[169] Because the plaintiffs failed to preserve this issue, and failed to even address the issue, they failed to meet their burden. The court pointed out, however, that it may very well have been able to reach a different conclusion had the plaintiffs actually presented evidence of less discriminatory alternatives.[170]

In his dissenting opinion, Judge Easterbrook believes that when stated the policy reveals "many less stringent options that might be almost as good at protecting interests of children."[171] For instance, the policy forbids all women with childbearing capacity from working in the area; however, some women with childbearing capacity are less likely to become pregnant than others. For instance, "[w]omen over 40 rarely have children,"[172] a woman who is widowed or divorced may not be as likely to become pregnant, a woman's husband may be sterile which would decrease her chances of pregnancy, or the woman may be taking birth control pills. A policy which did not exclude these women from the work area would be less stringent and still fulfill the employer's goal of protecting future offspring. The requirement is not that there be zero risk, but rather that there be an alternative which is less discriminatory.[173]

The plaintiff has the burden of showing that there are other less discriminatory alternatives. In this case the plaintiff's failure to argue that the employer could instigate other, less discriminatory, alternatives was fatal; thus the court was in a position to uphold the employer's policy as legitimately based upon a business necessity. It is apparent from this decision that the plaintiff must always address the issue as to less discriminatory alternatives to the exclusionary policy or risk summary judgment of the claim.

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168. *Johnson Controls*, 886 F.2d at 891.

169. *Id.*

170. *Id.* at 890.

171. *Id.* at 919. *See, e.g.*, Comment, *Fetal Protection Programs Under Title VII—Rebutting the Procreation Presumption*, 46 U. PA. L. REV. 755 (1985), in which the author stated, "These policies are . . . over inclusive and paternalistic. . . . By covering all fertile women without respect to marital status, sexual activity, use of contraception, or fertility of the sexual partner, fetal protection programs assume that women cannot be trusted to act responsibly." *Id.* at 764 (footnote excluded).

172. *Johnson Controls*, 886 F.2d at 919.

173. *Id.* at 919.

D. The Equal Employment Opportunity Commission's Position

Although the EEOC has accepted the *Wright-Hayes* analytical framework for use in disparate impact cases relating to fetal protection policies,[174] in a recent ruling[175] the EEOC refused to endorse the *Johnson* decision and will not rely on it for other fetal protection discrimination claims. In the ruling the EEOC clarified its position as to the use of the business necessity defense when it stated "[w]e did not mean to suggest that a fetal protection policy fits within the category of an adverse impact case."[176] The EEOC reiterated that "policies which exclude only women constitute per se violations of Title VII."[177] Therefore, the *Johnson* Court's use of the disparate impact analysis set forth in the *Atonio* decision was in error and the plaintiff should not have to bear the burden of disproving business necessity. Rather, "the burden is on the employer to justify its policy . . . [and] the employer must prove that the policy it has adopted to reduce risk is narrowly tailored."[178]

E. Application of the BFOQ Defense

The Pregnancy Discrimination Act[179] states that:

> the terms because of sex or on the basis of sex include, but are not limited to, because of or on the basis of pregnancy, childbirth, or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes . . . as other persons not so affected but similar in their ability or inability to work.[180]

Title VII and the Pregnancy Amendment provides one exception to this directive when it allows that:

> [N]otwithstanding any other provision of this subchapter, (1) it shall not be an unlawful employment practice for an employer to hire and employ employees . . . on the basis of . . . religion, sex, or national

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174. *See supra* note 93 and accompanying text.

175. EEOC Withholds Approval of Board Fetal Protection Plans, 58 U.S.L.W. 2461 (U.S. Feb. 13, 1990).

176. *Id.*

177. *Id.*

178. *Id.*

179. *See supra* notes 6-7 and accompanying text.

180. 42 U.S.C. § 2000e(k) (1982).

> origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise.[181]

Johnson's exclusionary policy is based on the actual ability to become pregnant. As such, it is certainly based upon sex. Therefore, it falls squarely within the Act and only the BFOQ defense should be allowed.

The court believed that the BFOQ defense, if applicable to fetal protection policy cases, would justify the policy used by Johnson Controls. The court noted that in *Dothard v. Rawlinson*,[182] the Supreme Court had stated "discrimination based on sex is valid only when the *essence* of the business operation would be undermined by not hiring members of one sex exclusively."[183] To rely on a BFOQ exception, the employer must prove "that he had reasons to believe, that is a factual basis for believing, that all or substantially all women would be unable to perform safely and efficiently the duties of the job involved."[184]

The court had a difficult time in deciding that the fetal protection policy was reasonably necessary to further the goals of industrial safety. It finally reached its decision through the use of a very tortured analysis. The analysis involved a statement in *Dothard* that "more is at stake in this case than an individual woman's decision to weigh and accept the risks of employment because of her childbearing capacities."[185]

In making the decision that "more was at stake," the court discussed three issues. First, the court noted that a woman may discount the risk to her infant in deciding to work in the high lead area. Second, the birth of handicapped children is a cost to society because of government financed programs to train and care for these children. Finally, parents may not always rely on parental rights in making

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181. *Id.* § 2000e-2(e).

182. 433 U.S. 321 (1977) (holding that women could be excluded from employment as guards, in a contact position, in a maximum security male prison because of the risk of sexual assault which would undermine prison security).

183. *Johnson Controls*, 886 F.2d at 894 (quoting Dothard v. Rawlinson, 433 U.S. 321, 333 (1977) (quoting Diaz v. Pan Am. World Airways, 442 F.2d 385, 388 (5th Cir. 1971), *cert. denied*, 404 U.S. 950 (1971))).

184. *Id.* at 894 (quoting *Dothard*, 433 U.S. at 333 (quoting Weeks v. Southern Bell Tel. & Tel. Co., 408 F.2d 228, 235 (5th Cir. 1969))).

The Pregnancy Discrimination Act states that "women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment related purposes . . . as other persons not so affected but similar in their ability or inability to work." 42 U.S.C. § 2000e(k) (1982).

185. *Id.* at 897. In *Dothard* the Court found that more was at stake because the risk of assault would undermine prison security.

decisions which affect their children's health and well-being.[186] With consideration of these factors it was easy for the court to determine that "more was at stake" in this case—the safety of unborn children. Since "more was at stake" the court felt that the employer had sufficiently demonstrated that the policy was "reasonably necessary to further industrial safety, [which the court had] determined to be part of the essence of Johnson Controls' business."[187]

The major problem with this analysis is that the company and the court never actually addressed the issue whether there was "reasonable cause to believe . . . that all or substantially all women capable of pregnancy would be unable to perform safely and efficiently the duties of the job involved."[188] In *Dothard,* the "more that was at stake" related to job performance. A woman in a male prison may be subject to sexual assault and, therefore, may be unable to maintain order. This situation could pose a safety risk to others if violence broke out. Since the safety risk would arise because of the woman's inability to perform her job safely, the court allowed the employer to use the policy even though it did result in sex discrimination. "The more that is at stake" in *Johnson* is not related—even remotely—to job performance or an inability to perform the job safely. Johnson Controls' policy purportedly is based on the employer's concern for future generations; this objective is not at all concerned with the making of batteries. The women involved did work in the high lead areas until 1982, presumably performing their duties safely and efficiently.

The dissenting judges[189] in *Johnson Controls* agree that the BFOQ defense is appropriate for these cases. In addition, the judges note that to meet the defense's criteria "the employer must demonstrate 'a factual basis for believing that all or substantially all women would be unable to perform safely . . . and efficiently the duties of the job involved.'"[190] They do not agree, however, on the ultimate outcome.[191]

Judges Posner and Cudahy, dissenting, would remand for a full trial to provide the employer with an opportunity to try to prove that it has a valid BFOQ defense. Both believe that it may be difficult, but not totally impossible to prove a BFOQ defense for fetal policies, but that it is a mistake to affirm the summary judgment without a full trial. In addition, both believe that the BFOQ defense should not be construed so narrowly as to preclude the employer from considering ethical, legal,

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186. *Id.* at 897-98.
187. *Id.* at 898.
188. *Dothard,* 433 U.S. at 333; *see supra* notes 52, 183.
189. Cudahy, Posner, Easterbrook, and Flaum.
190. *Johnson Controls,* 886 F.2d at 902 n.1.
191. *Id.* at 901-21.

and business concerns about the effects of an employer's activities on third parties.[192] Judges Easterbrook and Flaum, also dissenting, believe that the BFOQ defense requirements could not be met in this case and that the court erred in granting summary judgment using the *Wright-Hayes* approach to business necessity.

F. Summary Judgment Proceedings

By allowing this policy to be upheld in a summary judgment proceeding the court essentially has expanded the business necessity defense and the bona fide occupational qualification defense without allowing for complete consideration of the issues in a trial. The *Hayes-Wright* business necessity defense has been given further support. Thus, if an employer can show that substantial fetal harm will result from maternal, as opposed to paternal exposure, the defense will be upheld absent proof of a less discriminatory alternative. This should serve as a warning to all future plaintiffs to address the issue of a less discriminatory alternative or possibly risk losing their claim in a summary judgment proceeding.[193]

The employer is not unjustified in expressing concern over the potential costs involved should a child actually be harmed by the toxic chemicals. Future litigation could result[194] in the employer being sued by the child who is injured from toxic chemicals which are introduced into the mother's system during or prior to pregnancy.[195] The employer is thus placed between the proverbial "rock and a hard place." The employer must allow equal employment opportunity for women, protect its employees from health hazards, and deal with the issue of future liability should fetal injury actually occur. Title VII does not require a company to totally ignore social and economic costs providing they actually are "reasonably necessary to the normal (civilized, humane, prudent, ethical) operation of [that] particular business."[196]

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192. *Id.* at 904.

193. *Id.* at 901-21.

194. Judge Posner, dissenting, stated: "[I]t is difficult to estimate Johnson Controls' exposure to tort liability, but it would be premature, in this age of mass-tort suites (which for example drove the asbestos industry into bankruptcy), to dismiss it as trivial." *Id.* at 905 (Posner, J., dissenting).

195. Judge Posner, dissenting, noted that one tort suit against a battery manufacturer had been brought for lead injury to a child. *Id.* In Security Nat'l Bank v. Chloride, Inc., 602 F. Supp. 294 (D. Kan. 1985), the plaintiff got to a jury on the issue, but the verdict was for the defense. *Johnson Controls*, 886 F.2d at 905.

196. *Id.* at 906.

It may be that at some point these social costs will actually impede the company's manufacturing process, but that issue should be left to a reasonable fact-finder's determination, not decided in a summary judgment proceeding.

VI. CONCLUSION

The *Johnson* Court addressed the question whether an employer's fetal protection policy may be upheld even if it results in employment discrimination. The court upheld the policy using both the business necessity defense for disparate impact cases and the bona fide occupational qualification defense. The business necessity defense may have been upheld simply because the plaintiff failed to rebut the employer's contention that there were no less discriminatory alternatives. Or, it possibly was upheld because the plaintiff did not present evidence of non-animal tests showing that male workers' exposure to lead also could result in fetal injury. It is apparent, however, that the Seventh Circuit considers the test set forth in the *Hayes* and *Wright* decisions to be valid in determining whether an employer's fetal protection policy is to be upheld despite the fact that the policy is overtly discriminatory and clearly not facially neutral.

The court was correct in using the BFOQ analysis as mandated by the Pregnancy Act. The court, however, misapplied the test when it upheld the BFOQ defense to recognize concern for fetal safety. The court ignored the mandates of the Pregnancy Discrimination Act by allowing use of the BFOQ defense in this case.

Historically, protective legislation was based upon the idea that something "more was at stake" than simply a woman's decision to work. This "something more" always related to childbearing capabilities or protection of the woman from some anticipated harm.[197] Title VII and the Pregnancy Act were designed to prevent this type of discrimination except when the childbearing ability directly affects the woman's ability to perform the task.[198]

The court has undermined the purpose of Title VII by allowing this "something more" to be related strictly to childbearing capacity. Title VII was designed to prevent employment policies which deprive women of opportunities to compete on an equal basis with men. By ignoring the Pregnancy Act and its directives, the court provides an open door in which policies may be developed that will affect women in their future employment opportunities.

It is difficult to think of a case where we could not find "something more at stake" whenever operating a business poses a danger to third

197. *See supra* notes 145-52 and accompanying text.

198. See *supra* notes 6-7 and accompanying text.

persons. This especially is true since the court has determined that the manufacture of batteries is unique because it uses a highly toxic substance. This reasoning may enable any employer using toxic substances to claim it has a unique type of business and, therefore, it qualifies to use the BFOQ defense to exclude women from the workplace based upon fetal concerns. This is a definite diversion from the BFOQ defense set out by Congress as it relates to the Pregnancy Amendment.

As more chemicals and toxic substances are tested for their effects upon reproductive capabilities and fetal damage,[199] it will probably become easier for the employer to show fetal risk. It is apparent from the *Johnson* decision that wherever there is fetal risk there will be the "something more" necessary to enable the employer to use the BFOQ defense.

This issue merits careful consideration by the Supreme Court. This is especially true in light of the EEOC's recent statement that the court used the disparate impact analysis when it should have used the disparate treatment analysis in requiring the plaintiff to disprove the business necessity defense. It seems apparent that the case should not have been decided in a summary judgment proceeding. The issue needs to be resolved, if not by the Supreme Court then by Congress, because it is one of great concern for all members of society.

Fetal safety is a valid concern for the employer, the parent, and the government. Nevertheless, this concern should be weighed in light of the costs being borne by women and their dependents because sex-specific policies, no matter how reasonable, result in a disadvantage for women in the workplace. If Congress and society as a whole, believe that to minimize birth defects employers should be allowed to exclude women in cases where fetal hazards exist, then Congress could create a narrow defense to protect employers from discrimination challenges. Until the Supreme Court or Congress addresses this issue, employers should not be allowed to make decisions that affect women on such a personal level. Women, rather than the court or their employers, should be regarded as the most competent to make decisions regarding employment risks. The courts should not be left to resolve this issue on a case-by-case basis.

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199. *See, e.g.*, 54 Fed. Reg. 25,714 (1989). E.I. duPont de Nemours & Company is conducting tests regarding the effects of Hexafluoropropene on the ovaries of hamsters, the mutagenicity of hexafluoropropylene and the mutagenicity of vinyl fluoride. *Id.*